

1 Scott A. McMillan, SBN 212506
Michelle D. Volk, SBN 217151
2 Sean E. Smith, SBN 288973
The McMillan Law Firm, APC
3 4670 Nebo Dr., Suite 200
La Mesa, CA 91941-5230
4 Tel. 619-464-1500 x 14
Fax. 206-600-5095
5

6 Attorneys for Plaintiff,
Lycurgan, Inc.
7

8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 LYCURGAN, INC. d/b/a ARES
12 ARMOR,

Plaintiff,

13 v.

14 B. TODD JONES, in his official
capacity as Head of the San
15 Diego Bureau of Alcohol,
Tobacco, Firearms and
16 Explosives; and DOES 1-10,
Defendants.
17

CASE NO. 14-CV-1679 JLS (BGS)

LYCURGAN, INC.'S REPLY IN
SUPPORT OF EMERGENCY
APPLICATION FOR AN ORDER FOR
EXPEDITED RULE 34 INSPECTION
AND TO CONTINUE HEARING DATE
AND RELATED FILING DEADLINES.

Judge: Hon. Janis L. Sammartino
Dept.: 4A
Date: November 6, 2014
Time: 1:30 P.M.
18

19
20 **1. "Facial" or "Factual," what is the Challenge under 12(b)(1)?**

21 The Government challenges Lycurgan's effort to obtain discovery to meet
22 the burden imposed by the Government's 12(b)(1) motion suggesting that the
23 Government's motion to dismiss raised "a purely legal issue and is the only issue
24 raised by Defendant's motion to dismiss." [Oppo. at 2.]

25 ///

26 ///

27 ///

28

1 Indeed, the Government claims that the

2 “. . . discussion about EP80s in Defendant’s Points and Authorities
3 appears in the “Statement of Facts” and was provided as background
4 information.[See id. at 2-4.] The only issue discussed in the
5 “Argument” section of Defendant’s Points and Authorities is
whether CAFRA provides a jurisdictional basis to seek the return of
evidence seized pursuant to a criminal search warrant. [See id. at
4-5.]”

6 [Oppo., pg. 2, fn. 3., Doc. 9]

7 But, if that is the case – then why did the Government include the
8 declarations of two special agents, Agent Marks and Agent McCracken, in
9 support of the motion? Those declarations were clearly not provided as
10 “background information” because unless there is a “crime” there is no seizure for
11 “non-forfeiture purposes.” [See Motion, p. 4.]

12 It is not illegal to sell chunks of polymer material. Unless those chunks of
13 polymer material comprise a “firearm” under Federal law. Thereby, the
14 Government’s effort to establish that the chunks of polymer material are firearms
15 goes directly to the issues implicated in the 12(b)(1) motion.

16 Indeed, both of those ATF personnel described in sensational terms that the
17 subject unfinished lower receivers were not just “firearms” but those used to
18 make a version of an “M-16 machine gun.” [Marks Dec., ¶ 6, Doc 7-2.]

19 Rather than a “facial” challenge to subject matter jurisdiction, the
20 Government has made a “factual” challenge. This distinction was explained
21 yesterday by District Judge O’Neill in the Eastern District of California:

22 “Federal Rule of Civil Procedure 12(b)(1) provides for
23 dismissal of an action for "lack of subject-matter jurisdiction." Faced
24 with a Rule 12(b)(1) motion, a plaintiff bears the burden of proving
25 the existence of the court's subject matter jurisdiction. *Thompson v.*
26 *McCombe*, 99 F.3d 352, 353 (9th Cir. 1996). A federal court is
27 presumed to lack jurisdiction in a particular case unless the contrary
28

1 affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp.*, 655
2 F.2d 968, 968-69 (9th Cir. 1981). A challenge to subject matter
3 jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d 1214,
4 1242 (9th Cir. 2000). As explained in *Safe Air for Everyone v.*
5 *Meyer*, 373 F.3d 1035, 1038 (9th Cir. 2004): In a facial attack, the
6 challenger asserts that the allegations contained in a complaint are
7 insufficient on their face to invoke federal jurisdiction. By contrast,
8 in a factual attack, the challenger disputes the truth of the allegations
9 that, by themselves, would otherwise invoke federal jurisdiction.

10 A Rule 12(b)(1) motion can be made as a speaking motion—or
11 factual attack—when the defendant submits evidence challenging the
12 jurisdiction along with its motion to dismiss. *Thornhill Publ'g Co. v.*
13 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); see
14 *Savage*, 343 F.3d at 1039-40 & n. 2. A proper speaking motion
15 allows the court to consider evidence outside the complaint without
16 converting the motion into a summary judgment motion. See *Safe*
17 *Air*, 373 F.3d at 1039. "Once the moving party has converted the
18 motion to dismiss into a factual motion by presenting affidavits or
19 other evidence properly brought before the court, the party opposing
20 the motion must furnish affidavits or other evidence necessary to
21 satisfy its burden of establishing subject matter jurisdiction." *Savage*,
22 343 F.3d at 1039-40, n. 2. In a speaking motion, "[t]he court need
23 not presume the truthfulness of the plaintiff's allegations." *Safe Air*,
24 373 F.3d at 1039.
25 *Travelers Indem. Co. v. Centex Homes*, 2014 U.S. Dist. LEXIS 146456, 2-4 (E.D.
26 Cal. Oct. 14, 2014)

1 The Government made the effort to take the “factual” route with its
2 12(b)(1) motion. Thus, the rule expressed in *Laub v. United States Dept. of*
3 *Interior* applies and Plaintiff should be entitled to its discovery. See, *Laub v.*
4 *United States Dept. of Interior* (9th Cir. 2003) 342 F3d 1080, 1093.

5 **II. The Government is not prejudiced by providing the Technical Bulletin**
6 **according to a protective order**

7 The Government states:

8 “The specific document that Plaintiff seeks, ATF Technical Bulletin
9 14-01, is a law enforcement sensitive document that should be the
10 subject of a protective order before it is produced.”

11 [Oppo to Application, pg. 2, fn. 2]

12 Very well. Lycurgan will execute an interim protective order restricting
13 access to Technical Bulletin 14-01 to Lycurgan’s counsel and retired ATF Agent
14 Daniel O’Kelly. As Mr. O’Kelly has worked most of his career in law
15 enforcement, and in particular with the ATF – the security of the Technical
16 Bulletin as divulged to undersigned and Mr. O’Kelly should not alarm the ATF.

17 **III. Conclusion**

18 For the foregoing reasons, Plaintiff Lycurgan Inc. requests that the ATF
19 respond to the Request for Production of Documents in a shortened manner such
20 that Lycurgan’s expert may review the technical bulletin prior to the date set for
21 responding to the Defendant’s motion under 12(b)(1).

22 Respectfully submitted,

23 The McMillan Law Firm, APC

24 Dated: October 15, 2014

25 /s/ Scott A. McMillan

26 Scott A. McMillan
27 Attorneys for Plaintiff
28 Lycurgan, Inc.